2000

Roy Lee Glasper v. State of Utah : Brief of Appellee

Utah Court of Appeals

Roy Lee Glasper; pro se.
Erin Riley; assistant attorney general; Mark L. Shurtleff; attorney general; counsel for appellee.

IN THE UTAH COURT OF APPEALS

ROY LEE GLASPER,	:	
Petitioner/Appellant,	:	**Case No. 20000481-CA**
v.	:	**Priority No. 3**
STATE OF UTAH,	:	
Respondent/Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM AN ORDER DISMISSING A PETITION FOR POST-CONVICTION RELIEF IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY, UTAH, THE HONORABLE J. PHILIP EVES PRESIDING

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Appellant Pro Se

NO ORAL ARGUMENT OR PUBLISHED DECISION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

ROY LEE GLASPER,	:	
Petitioner/Appellant,	:	**Case No. 20000481-CA**
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Petitioner appeals the district court's dismissal of his petition for post-conviction relief challenging his convictions for burglary, a third degree felony, in violation of Utah Code Annotated § 76-6-202 (1995), and theft, a third degree felony, in violation of Utah Code Annotated § 76-6-404 (1995). This Court has jurisdiction under Utah Code Ann. §78-2a-3(f) (1996).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

Issue I: Should petitioner's claims be dismissed because they are inadequately briefed?

Standard of Review: "Briefs that do not comply with rule 24 'may be disregarded or stricken, on motion or sua sponte by the court.' Utah R. App. P. 24(j)." *State v. Gamblin*, 2000 UT 44, ¶ 8, 1 P.3d 1108.

Issue II: Did the district court properly deny and dismiss the petition for post-conviction relief?

Standard of Review: The following standard of review applies:

> Our standard of review for an appeal from a dismissal of a petition for post-conviction relief depends on the issue appealed. Though we review the trial court's conclusions of law for correctness, we will disturb findings of fact only if they are clearly erroneous. Further, "'we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted.'"

Matthews v. Galetka, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following constitutional provisions, statutes, and rules relate to this appeal:

Addendum A - **Utah Rule of Civil Procedure 65C**

Addendum B - **Post-Conviction Remedies Act, Utah Code Ann. §78-35a-101 through § 78-35a-110 (1996)**

Addendum C - **Burglary - Utah Code Ann. § 76-6-202 (1995), and Theft - Utah Code Ann. § 76-6-404 (1995)**

STATEMENT OF THE CASE

Petitioner was charged with burglary, a third degree felony, in violation of Utah Code Annotated § 76-6-202 (1995), and theft, a third degree felony, in violation of Utah Code Annotated § 76-6-404 (1995) (R. 487-88). After initially requesting a jury trial, petitioner chose to try his case to the bench (R.342). Following a bench trial on April 2, 1997, petitioner was convicted of both counts (R. 339). After several delays,

petitioner was sentenced to two consecutive zero-to-five year sentences on July 7, 1997 (R. 336-37).

Petitioner appealed his conviction and sentence. This Court affirmed in a memorandum decision dated September 11, 1998 (R. 317-19) (Addendum D).

In June 1999, petitioner filed a petition for post conviction relief (entitled an application for writ of habeas corpus) in district court (R. 1-200). In a Memorandum Decision dated June 30, 1999, the court summarily dismissed petitioner's claims relating to discretion of the trial judge, imposition of consecutive sentences, and insufficiency of the evidence, because these issues were (or should have been) raised on direct appeal (R. 205-210) (Addendum E). The court directed that a copy of the petition be served on the Utah Attorney General, with respect to petitioner's claims of ineffective assistance of counsel. *Id.*

The original petition named A. C. Newland, the warden of a prison in California, as the respondent. Petitioner was incarcerated in California through the Interstate Compact. However, petitioner remains under the Utah Department of Corrections, and his release date will be determined by the Utah Board of Pardons. Since the Utah Attorney General is not counsel for and does not represent Warden Newland of the California State prison, the office of the Utah Attorney General filed a motion to dismiss the petition without prejudice, to allow petitioner to file an

amended or corrected petition naming the State of Utah as the respondent (R. 211-215).[1]

In July 1999, petitioner filed an amended petition (R. 219-228). However, in addition to changing the respondent to the State of Utah, the amended petition included new and additional claims. The district court summarily dismissed petitioner's new claims which related to the scheduling of the trial and allegations that the State suppressed exculpatory evidence on direct appeal (R. 242-246) (Addendum F). The Court then directed the Attorney General to respond to those points designated as arguments 3, 4, 6, and 7 within the petitioner's amended petition. Those claims alleged ineffective assistance of counsel for failing to secure defense witnesses, for failing to use defense funds to place an add in local papers to ascertain defense witnesses, for failing to introduce crime scene photographs, for stipulating to the intent to commit theft, and for failing to file a reply brief on appeal (R. 242-246).

The State filed a written response to the claims specified by the court (R. 513). On January 20, 2000, after receiving the State's written response, the court entered a memorandum decision which held that "even if the facts are as represented by the petitioner, he has failed to show any basis upon which the court could find his counsel ineffective for failing to pursue the unidentified couple. That

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[1] Rule 65C(h), Utah R. Civ. P. provides that "[i]f the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General."

claim is hereby dismissed summarily." (R. 555) (Addendum G). The Court also dismissed petitioner's allegation that he received ineffective assistance of appellate counsel when his counsel told the Court of Appeals there was no dispute that the petitioner intended to commit a theft (R. 553-54).

On May 9, 2000, the court held an evidentiary hearing on whether petitioner received ineffective assistance of counsel for failing to interview or call Detective Orton as a witness, and for failing to introduce photographs at trial (R. 553-57, 594-95).

On May 11, 2000, the district court entered a final written memorandum decision which denied and dismissed the petition for post-conviction relief (R. 596-605) (Addendum H). Petitioner timely appeals.

STATEMENT OF THE FACTS

In the early evening of January 24, 1997, petitioner and his companion, Shanta Venson, drove into Cedar City in a red Jaguar sports car (R. 431, 375). They stopped at Maurice's, a clothing store, where Venson purchased several items using a credit card (R. 374, 364). A short time later the two pulled into the parking lot of a Deseret Industries Thrift Store ["DI"] (R. 373). Although the DI had just closed, the front doors to the main floor of the store remained unlocked so that employees could bring in sales merchandise from the front sidewalk (R. 435-36). Following standard procedure, employees had placed a "CLOSED" sign on the front

door and turned off the bank of lights closest to the front of the store (R. 435, 411, 407, 389).

Petitioner and Venson entered the store separately (R. 372). Venson remained near the front of the store to choose a belt while petitioner moved to the back of the store among the clothing racks (R. 418, 416, 398). Another couple entered the store soon after (R. 418). There were no DI employees on the sales floor at this time (R. 419, 363).

Store manager Dennis Goldsworthy was putting away the day's receipts and preparing the daily deposit in his private office at the back of the store (R. 435, 423). Hearing unfamiliar voices at the front of the store, he left his office to investigate (R. 434-35). He left a bank deposit bag containing $794.00 in cash and $329.96 in checks sitting on his desk in his office (R. 427-29). When he reached the front of the store he informed Venson and the other couple that the store was closed (R. 434). The second couple left immediately, but Venson became "somewhat animated" and repeatedly insisted on purchasing a fifty-cent belt (R. 433-34). Goldsworthy, who was unaware that petitioner was also in the store, agreed to sell her the belt but only if she had exact change (R. 434, 420). He explained that all of the money had been removed from the cash registers (R. 434).

As Goldsworthy performed the transaction, DI employee Joy Stover came up the stairs to the main floor (R. 399). Stover observed petitioner near the manager's office and saw him "walk over behind the clothes fixture and kind of slink down and

walk towards the front of the store" (R. 398, 392). As petitioner wove his way towards the front door, she noticed the bank bag in his hand and watched him "put the bag under his shirt" (R. 396-97). Petitioner and Venson exited the store together (R. 431).

When Stover told Goldsworthy what she had seen, Goldsworthy immediately rushed to the office and discovered that the bank bag was missing (R. 431-33, 395). Store employees raced to the parking lot and approached the closest vehicle, which was occupied by the couple that had entered the store after petitioner (R. 402, 382-83). By the time the employees determined that petitioner and Venson were not in the car, petitioner's red Jaguar was leaving the parking lot (R. 431). The employees then notified police about the incident and described petitioner's vehicle (R. 382).

A report of the incident with the vehicle description went out on the police radio (R. 460-61). Officer Preston Griffiths was patrolling I-15 northbound near Parowan when he heard the report (R. 458). Shortly thereafter, he saw a car matching the report's description speed past him (R. 457). Officer Griffiths eventually caught up with the car and pulled it over after it exited I-15 (R. 456a).[2]

When petitioner got out of the Jaguar and came toward the police car, Officer Griffiths drew his weapon, ordered petitioner onto the ground and handcuffed him (R. 456-456a). A subsequent search of the vehicle uncovered the bank bag, torn up

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[2] This page is not numbered. Since it lies between the pages designated as 456 and 457, the State refers to it as 456a. (The page is stamped with number 158, which was its designation in the previous direct appeal).

checks made out to Deseret Industries, and a deposit slip (R. 438-40). The missing cash, amounting to $794.00, was found in Venson's left sock (R. 451).

SUMMARY OF ARGUMENT

Petitioner's claims should be dismissed because they are inadequately briefed. Petitioner does not appropriately challenge the decisions of the district court, but merely attempts to raise the same arguments which he raised in his petition for post-conviction relief. Rather than provide meaningful legal analysis, petitioner merely asserts facts and opinions that he believes support his claims and concludes that he is entitled to relief. This does not conform to the requirements of the briefing rule.

Even if petitioner's brief is not dismissed for inadequacy, the decision of the district court should be affirmed because the petition for post-conviction relief was properly denied and dismissed. The district court acted appropriately when it summarily dismissed some of petitioner's claims. The court also ruled correctly when it held that petitioner had not established any ineffectiveness of trial or appellate counsel.

ARGUMENT

I. PETITIONER'S CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE INADEQUATELY BRIEFED.

Petitioner appeals the dismissal of his petition for post-conviction relief. However, in his appellate brief, petitioner simply raises the same arguments he

raised in his post-conviction petition.[3] Petitioner does not challenge the decisions of the district court. He has not argued or established that any of the court's findings were clearly erroneous, or that its conclusions of law were incorrect. Rather than provide meaningful legal analysis, petitioner merely asserts facts and opinions that he believes support his claims, and then concludes that he is entitled to relief. This does not conform to the requirements of the briefing rule.

Inadequate Briefing. Rule 24 (a)(9), Utah Rules of Appellate Procedure, requires an appellant to include his "contentions and reasons . . . with respect to the issues presented," including "citations to the authorities, statutes and parts of the record relied on." This Court does not address issues inadequately briefed under this rule.[4] *See State v. Gamblin*, 2000 UT 44, ¶ 6, 1 P.3d 1108 (refusing to consider argument which is inadequately briefed); *MacKay v. Hardy*, 973 P.2d 941, 947-48 (Utah 1998).

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[3] Petitioner also attempts to raise some new issues which were never raised in his petition. If a claim was not raised in the petition, and was therefore not addressed by the district court, it will not be addressed for the first time on appeal. *See Pascual v. Carver*, 876 P.2d 364, 366 (Utah 1994). The issues concerning petitioner's waiver of a jury trial and the failure of his counsel to move to reduce the charge to a misdemeanor were not raised in the post-conviction petition. They therefore may not be addressed now.

[4] The State acknowledges that pro se briefs must be construed liberally. *See Moll v. Carter*, 179 F.R.D. 609, 610 (1998); *Whitney v. State of N.M.*, 113 F.3d 1170, 1173 (10th Cir. 1997). However, pro se litigants must still comply with minimal standards. Id. If errors alleged in the pro se brief, even if properly presented, would not amount to reversible error, they do not require full analysis. *See State v. Germonto,* 868 P.2d 50, 55 (Utah 1993).

Utah courts have consistently held that issues not properly briefed should not be addressed on appeal. *See State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). "'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited.'" *State v. Snyder*, 932 P.2d 120, 130 (Utah App. 1997) (citing *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)).

Petitioner has not properly briefed the issues. His brief does not identify any specific error by the district court. It does not cite to the record; nor does it cite applicable authority. It also does not provide any meaningful legal analysis. *See State v. Price*, 827 P.2d 247 (Utah App. 1992); *Phillips v. Hatfield*, 904 P.2d 1108 (Utah App. 1995).

Petitioner's brief also fails to make clear assertions, leaving the State, and this Court, the task of divining his position. *MacKay*, 973 P.2d at 948-49 (rejecting appellee's and cross-appellant's claim for failure to make clear assertions or to engage in even a "modicum of analysis" where appellee merely "quote[d] or paraphrase[d] the record at great length, leaving [the] court with the task of attempting to divine [appellee's] position").

Petitioner nowhere provides an analytical basis for his claim that denial of his petition for post-conviction relief should be overturned on appeal. *See* Utah R. App. P. 24(a)(9) (providing that argument section of appellant's brief must "contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on"); *see also*

State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (holding that "rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority"); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (holding that brief "must contain some support for each contention").

In sum, this Court is not "'a depository in which the appealing party may dump the burden of argument and research.'" *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)), *and see Thomas*, 961 P.2d at 305. Accordingly, petitioner's claims should be rejected. *See Jaeger*, 973 P.2d at 410 (refusing to consider appellant's claim due to the lack of meaningful analysis of cited authority); *Wareham*, 772 P.2d at 966 (refusing to address claim on appeal where petitioner's brief "wholly [lacked] legal analysis and authority to support his argument"); *State v. Bryant*, 965 P.2d 539, 548-49 (Utah App. 1998) (same); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) (same).

Failure to Marshal. Petitioner's claims also fail because his grounds for relief ignore the district court's findings and conclusions in support of its rulings (R. 205-10, 242-46, 551-59, 596-605) (Addenda E, F, G & H).[5] The law is well-settled that although the Court of Appeals will "review the trial court's conclusions of law for correctness, [it] will disturb findings of fact only if they are clearly erroneous. Further, "'we survey the record in the light most favorable to the findings and judgment; and

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[5] Petitioner has also failed to include a copy of the transcript of the evidentiary hearing held in the post-conviction case. It does not appear that the hearing was ever transcribed, since a transcript is not part of the court file.

we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted.'"" *Matthews v. Galetka*, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

A court's findings are "clearly erroneous only if they 'are against the clear weight of the evidence'" or if the reviewing court "'reaches a definite and firm conviction'" that they are mistaken. *State v. Gardner*, 844 P.2d 293, 295 (Utah 1992) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). The burden is on the petitioner to marshal all of the evidence in support of the district court's findings and then to demonstrate that the evidence does not support the findings. *State v. Alvarez*, 872 P.2d 450, 460-61 (Utah 1994). If the petitioner makes no attempt to marshal the evidence supporting the court's ruling and to demonstrate its insufficiency, this Court "accept[s] the trial court's findings as stated in its ruling." *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999).

Petitioner fails to carry his burden. Indeed, petitioner does not even acknowledge his burden to marshal the evidence supporting the district court's ruling. Instead, he refers only to facts or events which he believes are favorable to his position and then broadly asserts that contrary to the district court's ruling, the record supports his claims. Because petitioner has failed to marshal the supporting evidence and demonstrate its insufficiency, this Court should accept the district court's findings. *Benvenuto*, 983 P.2d at 558.

In sum, petitioner's claims are inadequately briefed and neither marshal the evidence supporting the district court's findings, nor demonstrate its inadequacy. Therefore, this Court should decline to consider petitioner's challenge to the district court's ruling denying his petition for post-conviction relief. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991) (failure to marshal evidence); *Jaeger*, 973 P.2d at 410 (failure to meaningfully analyze claims).

II. THE DISTRICT COURT PROPERLY DENIED AND DISMISSED THE PETITION FOR POST-CONVICTION RELIEF.

Should this Court excuse the failures of petitioner's brief, review of the action below nevertheless establishes that the district court properly denied and dismissed the petition for post-conviction relief.

A. The district court properly summarily dismissed several of petitioner's claims.

The district court summarily dismissed several of petitioner's claims (R. 205-210, 242-246) (Addenda E & F). These claims were dismissed before the State was ordered to respond, thus the State has not previously addressed these issues (R. 242-246). On appeal, petitioner does not clearly raise these issues. However, in his "PRAYER FOR RELIEF" (Br. Aplt 22), petitioner alleges that there was insufficient evidence to convict, and that he was inappropriately sentenced to consecutive terms. These issues were among the claims which were summarily dismissed by the district court. Therefore, the State will address these claims now.

Rule 65C, Utah Rules of Civil Procedure, provides that when a petition for post-conviction relief is filed, "[t]he assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. . . . The order of dismissal need not recite findings of fact or conclusions of law." Utah R. Civ. P. 65C(g)(1).

Under the Post-Conviction Remedies Act, a person is not eligible for relief on any ground that "was raised or addressed at trial or on appeal" or that "could have been but was not raised at trial or on appeal." Utah Code Ann. § 78-35a-106 (1996).

In its Memorandum Decision dated June 30, 1999, the district court summarily dismissed petitioner's claims relating to discretion of the trial judge, imposition of consecutive sentences, and insufficiency of the evidence, because these issues were "fully adjudicated on appeal, or should have been raised on appeal" (R. 207)(Addendum E).

On direct appeal, this Court addressed the issues related to consecutive sentences and held that "the trial court did not err in imposing two consecutive sentences." (R. 317-19) (Addendum D).[6] This Court also stated that it would not consider petitioner's challenge to the sufficiency of the evidence because he had

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[6] The copy of the Court of Appeals Memorandum Decision found in the record at 317-19 is missing page 2. Therefore, a complete copy of the Memorandum Decision has been included in Addendum D).

failed to marshal the evidence and to demonstrate why the evidence was insufficient. Id. Thus, the district court properly summarily dismissed these issues.

In July 1999, petitioner filed an amended petition (R. 219-228). The amended petition included new and additional claims. The district court entered an order summarily dismissing petitioner's new claims, which related to the scheduling of the trial and petitioner's allegations that the State suppressed exculpatory evidence on direct appeal. The basis for this dismissal was the new claims could have been raised on direct appeal, or the claims were frivolous (R. 242-246) (Addendum F). Thus, under the statutory guidelines of the Post-Conviction Remedies Act, the district court properly summarily dismissed these claims.

In addition, petitioner has not alleged on appeal that the district court erred in summarily dismissing these claims. Petitioner has not raised or addressed these issues anywhere in his appellate brief. Therefore, the issue of whether the district court properly summarily dismissed these claims is waived because it was not raised on appeal. *See Pasquin v. Pasquin,* 1999 UT App 245, ¶ 21, 988 P.2d 1 (issues not briefed by appellant are deemed waived and abandoned)*; Pixton v. State Farm Mutal Auto. Insur. Co. of Bloomington, Ill.*, 809 P.2d 746, 751 (Utah App. 1991) (where appellant fails to brief an issue, the point is waived).

B. The district court correctly ruled that petitioner had not established ineffective assistance of trial counsel.

In his petition for post-conviction relief, petitioner alleged that he received

ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must meet the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that (1) his attorney's performance was deficient, and (2) the deficient performance prejudiced his defense. Id. at 687.

Petitioner alleged that his trial counsel was ineffective because he failed to interview Detective Orton or call him as a witness at trial, and failed to introduce photographs of the scene of the crime (R. 553, 556-57)[7]

Petitioner also alleged that his counsel was ineffective for failing to take steps to locate the unidentified couple who were briefly in the Deseret Industries store, shortly before petitioner committed the theft (R. 556). The State filed a written response to these claims, as requested by the Court (R. 513).

After receiving the State's written response, the court entered a Memorandum Opinion which held that "even if the facts are as represented by the petitioner, he has failed to show any basis upon which the court could find his counsel ineffective for failing to pursue the unidentified couple. That claim is hereby dismissed summarily." (R. 555) (Addendum G).[8]

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[7] The district court also noted that at the evidentiary hearing petitioner attempted to present testimony about other alleged deficiencies in counsel's trial performance. "However, since those deficiencies were not raised by the petitioner in his Amended Petition for Writ of Habeas Corpus, the court declined to hear that evidence." (R. 602).

[8] This claim was not dismissed until after the state had filed its written response. However, it was dismissed prior to the evidentiary hearing.

The district court properly dismissed this claim. There was no indication who these people were, or whether they even lived in the local area. There was also no indication as to what their testimony would consist of, or even whether their testimony would help or hurt petitioner's case. It was not ineffective assistance of counsel to make a decision not to spend additional time and money on an attempt to locate an unnamed and unknown couple who may not even live in the area and whose testimony may not have helped the petitioner's case.

After an evidentiary hearing, the Court also dismissed petitioner's other claims concerning ineffective assistance of trial counsel. The Court ruled that the petitioner failed to satisfy the two-prong test for ineffective assistance of counsel set out in *Strickland*, 466 U.S. at 687 (R. 599-601).

The district court held that it was clear from the testimony of Detective Orton at the evidentiary hearing, that his testimony would not have been helpful to the petitioner at trial (R. 601) (Addendum H, p. 5). The Court held that petitioner failed to demonstrate how defense counsel erred by failing to call Detective Orton as a witness. In addition, even if there were any deficiency in not calling him as a witness, petitioner failed to demonstrate that his defense was prejudiced by failing to call Detective Orton as a witness (R. 599-601) (Addendum H, pp. 5-7).

The district court also held that petitioner failed to demonstrate that counsel erred in not taking photographs of the scene, and in relying on the diagram drawn by a witness at trial. Even if there were any error for failing to take and use

photographs, the petitioner failed to demonstrate any prejudice to his case from the lack of photographs (R. 598-99) (Addendum H, p. 7-8).

The district court correctly ruled that petitioner had failed to establish that he received ineffective assistance of trial counsel.

On appeal, petitioner does not discuss the court's findings or challenge the court's ruling on these issues. Petitioner has failed to show that the court's findings were clearly erroneous, or that its conclusion that petitioner failed to establish ineffective assistance of counsel was incorrect. *See Grossen v. Dewitt*, 1999 UT App 167, ¶ 10, 982 P.2d 581 ("because appellants do not challenge the court's findings, let alone demonstrate they are clearly erroneous, we 'assume [] that the record supports the findings of the district court.'") (quoting *Interwest Constr. v. Palmer*, 923 P.2d 1350, 1358 (Utah 1996) (citations omitted)).

C. The district court correctly ruled that petitioner failed to establish ineffective assistance of appellate counsel.

In his petition for post-conviction relief, petitioner alleged ineffective assistance of appellate counsel for failing to raise the issue of ineffective assistance of trial counsel on direct appeal. Petitioner also alleged that his appellate counsel was ineffective for failing to file a reply brief, and for acknowledging on appeal that there was no dispute that petitioner intended to commit theft.

After receiving the State's written response, the district court entered a memorandum decision which dismissed petitioner's allegation that he received

ineffective assistance of appellate counsel because his counsel failed to file a reply brief and told the Court of Appeals there was no dispute that the petitioner intended to commit a theft (R. 553-54) (Addendum G).[9]

The district court properly dismissed these claims. In his appellate brief on direct appeal, counsel said: "Although Defendant does not dispute the theft of the cash and checks, there was a dispute as to whether he committed a burglary." (R. 494). Petitioner Glasper testified at trial. Upon direct examination, he admitted to facts amounting to theft. He admitted that he picked up the bank bag, and that he unzipped it and saw money inside. He also admitted that he then put the bank bag in his pants and left the store. (R. 365 -68). Appellate counsel cannot change the facts from trial. Based on these facts, testified to by petitioner, appellate counsel appropriately conceded that petitioner did not dispute the theft.

Similarly, appellate counsel was not ineffective for not filing a reply brief. After receiving an opposing party's brief, appellate counsel may be allowed - but is not required - to file a reply brief. Rule 24(c) Utah Rules of Appellate Procedure, states: "The appellant may file a brief in reply to the brief of the appellee . . . Reply briefs shall be limited to answering any new matter set forth in the opposing brief." (emphasis added). Thus, a reply brief is not mandatory. In fact, the reply brief is

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[9] This claim was dismissed after the State's written response, but before the evidentiary hearing.

limited to answering new matters set forth in the opposing brief. If no new matters were set forth in the opposing brief, then no reply brief is necessary.

Here, counsel for petitioner did not simply neglect to file a reply brief. Rather, he made a specific choice and advised the Court that he did not intend to file a reply brief (R. 258). Petitioner did not raise any allegations as to why a reply brief should have been filed or what issues he believed a reply brief could have addressed. He did not allege that opposing counsel's brief raised any new matters which should have been addressed in a reply brief. Accordingly, petitioner has not established that failure to file a reply brief was ineffective assistance of counsel.

After the evidentiary hearing, (which established that there was no ineffective assistance of trial counsel), the district court found that petitioner had presented no evidence supporting his claim of ineffective assistance of appellate counsel (R. 598) (Addendum H). The court held that there was no evidence that the appeal was mishandled or that counsel's work on the appeal was prejudicial to petitioner. Id. The district court correctly ruled that petitioner failed to establish ineffective assistance of appellate counsel.

CONCLUSION

This Court should affirm the district court's ruling dismissing the petition for post-conviction relief.

RESPECTFULLY SUBMITTED this 2nd day of August, 2001.

MARK L. SHURTLEFF
ATTORNEY GENERAL

Erin Riley

ERIN RILEY
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on this 2nd day of August, 2001, I mailed, postage prepaid, two accurate copies of the foregoing Appellee's Brief to:

Roy Lee Glasper, #K-90014
CCC-Susanville/SD 49-4Low
P.O. Box 2210
Susanville, CA 96127

Erin Riley

Addenda

Addendum A

Rule 65C. Post-conviction relief.

(a) *Scope.* This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act.

(b) *Commencement and venue.* The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(c) *Contents of the petition.* The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) *Attachments to the petition.* If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records and other evidence in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil

proceeding that adjudicated the legality of the conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

(e) *Memorandum of authorities.* The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) *Assignment.* On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g) (1) *Summary dismissal of claims.* The assigned judge s hall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact; or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(h) *Service of petitions.* If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) *Answer or other response.* Within 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the

portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) *Hearings.* After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) *Presence of the petitioner at hearings.* The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) *Discovery; records.* Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) *Orders; stay.*

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) *Costs.* The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Section 64-13-23 and sections 21-7-3 through 21-7-4 7 govern the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) *Appeal.* Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

History: Added effective July 1, 1996.

Addendum B

PART 1

GENERAL PROVISIONS

78-35a-101. Short title.

This act shall be known as the "Post-Conviction Remedies Act." 1996

78-35a-102. Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2) Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense,

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole. 1996

78-35a-103. Applicability — Effect on petitions.

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996. 1996

78-35a-104. Grounds for relief — Retroactivity of rule.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution, or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence,

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity 1996

78-35a-105. Burden of proof.

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence 1996

78-35a-106. Preclusion of relief — Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion,

(b) was raised or addressed at trial or on appeal,

(c) could have been but was not raised at trial or on appeal,

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not raised in a previous request for post-conviction relief or

(e) is barred by the limitation period established in Section 78-35a-107

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel 1996

78-35a-107. Statute of limitations for post-conviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken,

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken,

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed,

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed, or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section. 1996

78-35a-108. Effect of granting relief — Notice.

(1) If the court grants the petitioner's request for relief, it shall either

(a) modify the original conviction or sentence or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate

(2) (a) If the petitioner is serving a felony sentence the order shall be stayed for five days Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary. 1965

78-35a-109. Appointment of counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition. 1965

78-35a-110. Appeal — Jurisdiction.

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3. 1965

Addendum C

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

History: C. 1953, 76-6-202, enacted by L. 1973, ch. 196, § 76-6-202.

76-6-404. Theft - Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

History: C. 1953, 76-6-404, enacted by L. 1973, ch. 196, § 76-6-404.

Addendum D

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 971439-CA
	)	
Roy Lee Glasper,	)	
	)	F I L E D
Defendant and Appellant.	)	(September 11, 1998)

Fifth District, Cedar City Department
The Honorable J. Philip Eves

Attorneys: Floyd W. Holm, Cedar City, for Appellant
Jan Graham and Kris C. Leonard, Salt Lake City, for Appellee

Before Judges Wilkins, Jackson, and Orme.

ORME, Judge:

Whether the trial court correctly imposed two sentences is a question of law that we review for correctness. See State v. Stettina, 868 P.2d 108, 109 (Utah Ct. App. 1994). Appellant may be punished for both burglary and theft unless both were established by "the same act . . . under a single criminal episode." Utah Code Ann. § 76-1-402(1) (1995). The trial court concluded--and the State does not now dispute--that appellant's burglary and theft were part of a single criminal episode. Accordingly, the trial court may only punish appellant for crimes that "were a result of separate and distinct acts that resulted in separate and distinct crimes." State v. O'Brien, 721 P.2d 896, 900 (Utah 1986) (holding trial court did not err in imposing sentences for four separate crimes).

Appellant misstates the law in arguing that although neither burglary nor theft is a lesser included offense of the other, in

this case he could not have committed one without the other and, therefore, he should not be punished for both. In fact, appellant completed the burglary when he unlawfully entered for the purpose of committing a theft--regardless of whether he completed the theft. See Utah Code Ann. § 76-6-202(1) (1995). Likewise, appellant committed the theft by exercising control over another's property with the intent to deprive--regardless of whether the property was in a location open to the public. See id. § 76-6-404 (1995). Therefore, notwithstanding the single criminal episode, "[t]hese are separate acts requiring proof of different elements and constitute separate offenses." State v. Suarez, 736 P.2d 1040, 1042 (Utah Ct. App. 1987). See Duran v. Cook, 788 P.2d 1038, 1040 (Utah Ct. App. 1990) (concluding theft is not lesser included offense of burglary). See also State v. Porter, 705 P.2d 1174, 1178 (Utah 1985) ("Although defendant's crimes were committed during a single criminal episode, he committed two distinct burglaries separately punishable under section 76-1-402."). Accordingly, the trial court did not err in imposing two consecutive sentences.

We will not consider appellant's challenge to the sufficiency of the evidence to support the burglary conviction. To challenge the verdict in a criminal bench trial on the grounds of insufficient evidence, appellant must "marshal all the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom," even viewed in the light most favorable to the court below, "is insufficient to support the findings against an attack." State v. Moosman, 794 P.2d 474, 475-76 (Utah 1990). When a defendant merely "reargue[s] [his] case by recounting a version of the facts most favorable to [the] defendant while ignoring" evidence supporting the conviction, he has neither marshaled the evidence nor demonstrated why it is insufficient. State v. Scheel, 823 P.2d 470, 473 (Utah Ct. App. 1991).

Appellant asserts that the record contained conflicting evidence and points to those facts supporting a finding that the theft occurred without an unlawful entry. In so doing, appellant neither marshals the evidence favorable to the trial court's finding nor does he demonstrate how that evidence is somehow

insufficient to support the pertinent findings and resulting conviction.[1]

Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Michael J. Wilkins,
Associate Presiding Judge

Norman H. Jackson, Judge

---

1. In one limited respect, appellant's challenge presents a question of law not dependent on his first marshaling the evidence. Appellant argues that entry into the manager's office was not unlawful if the store was open to the public. In support, he points to an Alaska case which held that the defendant did not commit burglary by entering a beer cooler designated "employees only" because it was in a public grocery and liquor store. See Arabie v. State, 699 P.2d 890, 892, 895 (Alaska Ct. App. 1985). Arabie is inapposite, however, because, unlike the Utah Code, the Alaska statute does not contemplate unlawful entry into a portion of a building. See id. at 892; Alaska Stat. § 11.46.310(a) (Michie 1996).

Addendum E

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

ROY LEE GLASPER,	**MEMORANDUM DECISION**
Plaintiff,	
vs.	**CASE NO. 990500385**
A.C. NEWLAND,	
Defendant.	

This matter comes before the court pursuant to Rule 65C, Utah Rules of Civil Procedure. The case began on June 21, 1999, with the filing of Petitioner's Application For Writ Of Habeas Corpus, Affidavit of Impecuniosity, and Motion For Appointment Of Counsel. The court has reviewed the filings and now enters the following findings, conclusions and decisions.

Applicable Rule of Procedure

Petitioner brings his Application For Writ Of Habeas Corpus under the provisions of Rule 65B of the Rules of Civil Procedure (URCP). Since the Petitioner's Application challenges his conviction and sentence for a criminal offense, it is actually an Application which should be brought under the provisions of Rule 65C URCP and Utah's Post Conviction

Remedies Act, 78-35a-101, et seq. This court will consider this Application pursuant to that Rule and those statutory provisions.

Motion For Appointment Of Counsel

The Petitioner has requested that the State of Utah, or one of its political subdivisions, provide him with legal counsel to pursue this Application on his behalf. Under the law of this State, the Petitioner is not entitled to such legal counsel for the prosecution of a proceeding such as is currently before the court. This court has no resources available to provide legal assistance to the Petitioner and therefore denies his Motion. No legal counsel will be provided.

Impecuniosity Affidavit

It is apparent from the Petitioner's Affidavit and circumstances that he is unable to pay the costs of this proceeding, and the court so finds. Petitioner is allowed to proceed without paying the usual filing fees.

Jurisdictional Issues

In reviewing the Application, the court notes that the Petitioner is confined in the California Prison System. Petitioner does not state why he is entitled to relief from a Utah court. However, since the court has no facts, the court will assume that jurisdiction exists for the present. Likewise, the Petition does not specify whether the named Respondent, A.C. Newland, is the California custodian of the Petitioner or someone in Utah who holds the Petitioner in custody.

Summary Dismissal of Some Claims

Rule 65C (g)(1) URCP provides as follows:

> "Summary dismissal of claims. The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law."

Rule 65C (g) (2) URCP provides as follows:

"A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact; or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition."

Section 78-35a-106 Utah Code Annotated (UCA) provides as follows:

> "(1) A person is not eligible for relief under this chapter upon any ground that:
>
> (a) may still be raised on direct appeal or by a post-trial motion;
>
> (b) was raised or addressed at trial or on appeal;
>
> (c) could have been but was not raised at trial or on appeal;
>
> (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
>
> (e) is barred by the limitation period established in Section 78-35a-107."

A review of the Application filed by the Petitioner quickly reveals that Petitioner is attempting to re-litigate claims already ruled upon during the direct appeal in this case. In a Memorandum Decision issued September 11, 1998, the Utah Court of Appeals affirmed the consecutive sentences imposed by the trial court. In that same Decision, the Court of Appeals

refused to consider the claims of the appellant relating to the sufficiency of the evidence because the appellant had failed to marshal the evidence in support of the trial court's decision. In the footnote the same court held that the entry into the manager's office could constitute a burglary because of the wording of Utah's burglary statute.

In his Application, Petitioner challenges the imposition of consecutive sentences by the trial court, claims that the trial judge abused his discretion is imposing that sentence and claims that he received ineffective assistance of counsel from trial and appellate counsel. However, in his Memorandum Of Points And Authorities In Support Of Petition For Writ Of Habeas Corpus filed contemporaneously with the Application, the Petitioner argues the sufficiency of the evidence at trial and the ineffective counsel issues.

It is apparent that the issues raised by Petitioner have been fully adjudicated on appeal, or should have been raised on appeal, with the possible exception of the claims of ineffective assistance of counsel. Pursuant to the Rules and statute cited above, the Petitioner is not entitled to raise those adjudicated issues by this Application for Writ of Habeas Corpus. Accordingly, the court now summarily dismisses the Petitioner's claims related to the imposition of consecutive sentences, the abuse of discretion of the trial judge for imposing consecutive sentences, and the insufficiency of the evidence.

At this point the court is unable to determine if the Petitioner's claims of ineffective assistance have, or should have, been raised on appeal. Accordingly, pursuant to URCP, Rule 65C (h), the clerk is hereby directed to serve a copy of this Order, the Application and all

attachments, as well as Petitioner's Memorandum of Points and Authorities on the Attorney General for the State of Utah. The clerk is also to mail a copy of this order to the Petitioner.

DATED this 30th day of June 1999.

J. PHILIP EVES, District Court Judge

00206

Certificate of Mailing

I hereby certify that on this 30th day of June 1999, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

Roy Lee Glasper, K90014
P.O. Box 4000, Bld 4-222
Vacaville, CA 95696-4000

Jan C. Graham, Esq.
Attorney General
236 State Capitol
Salt Lake City, UT 84114

Maxine Munson, Deputy Clerk

Addendum F

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

ROY LEE GLASPER,	**ORDER**
Petitioner,	
vs.	**CASE NO. 990500385 WR**
A.C. NEWLAND,	
Respondent.	

This matter came before the court this date for review of the file. The court determined that since its Memorandum Decision of June 30, 1999, the parties have been filing documents which have not been brought to the court's attention by courtesy copies or by Notice to Submit For Decision. Having now reviewed those filings, the court now enters the following Findings, Conclusions and Order.

In its Memorandum Decision, the court directed that the Petitioner's Application For Writ Of Habeas Corpus was to be served upon the Attorney General of the State of Utah for a response, as required by the Utah Rules of Civil Procedure.

On July 19, 1999, Erin Riley, Assistant Attorney General for Utah filed the State's Motion To Dismiss asking that the Petition be dismissed without prejudice. The Motion was based on the form of the Petition which appeared to name as respondent an official of the California Penal System, where Mr. Glasper is serving his Utah sentences. The Utah Attorney General took the position in the Motion to Dismiss that it had no authority to represent the

California prison official holding Mr Glasper and asked that the Petition by dismissed so Mr Glasper could file an amended Petitioner naming a Utah respondent.

Instead of filing a response to the Motion To Dismiss, Mr. Glasper sent a handwritten letter to the court in which he referenced the Motion by Erin Riley. That letter was filed with the court on July 19, 1999. The letter did not oppose the Motion but indicated that the Petitioner intended to amend his petition.

On July 26, 1999, the Petitioner filed with the court an Amended Petition For Writ Of Habeas Corpus. This filing was not brought to the attention of this, or any other judge of this court. The Amended Petition seems to raise new issues as well as some of the issues previously dismissed from the original Petition filed by Mr. Glasper.

On August 11, 1999, Mr. Glasper caused to be filed a Request For Extension Of Time In Which To File A Notice Of Appeal.

On August 9, 1999, the Attorney General for Utah filed a Motion For Clarification asking if the court had ruled on the Motion to Dismiss and asking for clarification of the need to respond to the Amended Petition now on file.

Having now learned of the various filings by the parties since the court's Memorandum Decision, the court now enters the following:

1. Ruling on the Motion to Dismiss;

2. Ruling on the Request For Extension Of Time In Which To File A Notice Of Appeal; and

3. Ruling on the Motion For Clarification.

Motion To Dismiss

The time for a response to this motion has now expired with no opposition having been filed by Mr. Glasper. Indeed, Mr. Glasper has filed an Amended Petition, which the court takes as an indication that he does not oppose the Motion To Dismiss as long as he is able to file the Amended Petition. Therefore, the court now grants the Motion to Dismiss and the original Petition is hereby dismissed without prejudice to the filing of an amended petition naming the State Of Utah as respondent.

Request For Extension Of Time In Which To File A Notice Of Appeal

The time for response to this Request has also expired with no opposition from the State of Utah. However, since there is no final, appealable order in this case from which Mr. Glasper can appeal, the Request is hereby denied, as it is premature.

Motion for Clarification

Having now ruled on the Motion To Dismiss, the court has already dealt with some of the issues raised in the State's Motion. The State's Motion To Dismiss has been granted.

The court hereby rules that the Amended Petition filed by Mr. Glasper shall be treated as timely filed and presently before the court.

In compliance with Rule 65C, the court has now reviewed the Amended Petition to determine whether any or all of the issues raised therein are subject to summary dismissal for being frivolous, or for having been previously adjudicated. In its Memorandum Decision of June 30, 1999, the court held that the claims of the petitioner raised in the original petition were subject to summary dismissal, except the claims of ineffective assistance of counsel.

These claims were dismissed because they were raised and ruled upon, or should have been raised during the direct appeal.

In his Amended Petition, Mr. Glasper again argues that the evidence was insufficient to support his conviction, and claims abuse of discretion by the trial judge in finding him guilty. These issues have been adjudicated on direct appeal, or should have been raised on direct appeal and therefore they are again order summarily dismissed by this court. Likewise, Mr. Glasper should have raised his claims relating to the scheduling of the trial and his allegations that the State suppressed exculpatory evidence on direct appeal. Those claims are likewise dismissed as frivolous. These rulings dispose of the portions of the Amended Petition designated as Arguments 1, 2, and 5.

At this point, without any factual setting, the court is unable to determine whether the claims of ineffective assistance of trial and appellate counsel are frivolous. The State Of Utah is directed to respond to those points designated as Arguments 3, 4, 6, and 7 within the time limits set out in Rule 65C. The clerk will mail a copy of this Order to the Attorney General for the State of Utah, care of Assistant Erin Riley and to the Petitioner.

DATED this 8th day of September 1999.

J. PHILIP EVES, District Court Judge

Certificate of Mailing

I hereby certify that on this 8th day of September 1999, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

Roy Lee Glasper
#K-90014 / Bld. 23-C-3U
CSP-Solano
P.O. Box 4000
Vacaville, CA 95695-4000

Erin Riley, Esq.
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Maxine Munson, Deputy Clerk

Addendum G

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

ROY LEE GLASPER, **Petitioner,** **vs.** **STATE OF UTAH,** **Respondent.**	**MEMORANDUM OPINION** **CASE NO. 990500385 WR**

This matter comes before the court for decision on the pending Petition For Post-Conviction Relief (Petition) and "Motion to compel Deputy Attorney General Erin Riley to prepare and forward copies of case Law." (hereinafter Motion To Compel), both filed by Petitioner Roy Lee Glasper. The court has reviewed the record and the submissions of the parties and now finds and rules as follows.

Motion To Compel

Petitioner was sentenced in Utah to two consecutive terms of 0 to 5 years in the State prison upon his conviction for theft and burglary. He is currently incarcerated in a California Prison, having been transferred there at this own request. He is still under the jurisdiction of the Utah Board of Pardons.

Mr. Glasper filed his petition in this state and this court, raising various claims of impropriety relating to his conviction and sentence. The court ordered his claims dismissed as frivolous, except those raising claims relating to his assertion that he was denied effective assistance of counsel. (See the court's Memorandum Decision of September 8, 1999.)

The Utah Attorney General filed a Response to the remaining claims on November 12, 1999. Thereafter, on November 15, 1999, Mr. Glasper filed his Motion To Compel, in which he seeks an order of this court requiring the Utah Attorney General to "...prepare true and clear, complete copies of all case law, Statutes, and referred to material that cannot be found in the prison law library here at Solano State Prison in California."

Assistant Attorney General Erin Riley, who represents the State of Utah in this matter, has filed an objection to Petitioner's Motion To Compel. The State argues that it lacks the resources to comply with Mr. Glasper's unusual request. The State further argues that there is no legal requirement that Mr. Glasper be provided legal research by the State's counsel in a proceeding brought be Mr. Glasper under the provisions of Rule 65C, Utah Rules of Civil Procedure.

There has been no response to the State's objection by Mr. Glasper, even though the objection was filed on December 13, 1999.

The court is not aware of any statute or case law requiring counsel for the respondent in a post-conviction relief case to provide the pro se petitioner with copies of the legal research upon which the respondent relies. This court sees no reason to order that procedure in this case. The petitioner's Motion To Compel is overruled and denied.

To grant the motion would place the State's attorney in the position of supplying the petitioner with his legal research. The burden of supplying the petitioner with legal authorities rests upon the petitioner, even though he is representing himself. It is enough that the State's representative provides the citation to the cases and statutes upon which it relies. These

materials are published, and it is up to the respondent to go to the effort of obtaining any copies which he chooses to review.

In addition, there is no affidavit or other proof before the court that the Solano State Prison library does not contain these materials, except the unsworn statement of the petitioner. The problem may well be that the petitioner lacks the legal research skills to locate those cases, and it is clear to this court that Mr. Glasper is not entitled to enlist the legal expertise of the opposing counsel to do that research or provide it to petitioner.

The issues remaining to be resolved in this case relate to the petitioner's claims of ineffective assistance of trial and appellate counsel. The petitioner has adequately addressed the issues raised by the leading case in the area, Strickland v. Washington, 466 U.S. 668 (1984), and has cited that case in his pleadings. The determination to be made is not legally complicated.

Petition For Post-Conviction Relief

The Petition currently before the court is the Amended Petition For Writ of Habeas Corpus, Post Conviction Remedies, (hereinafter Petition) filed by the petitioner on July 26, 1999. The State of Utah has now responded to the arguments numbered 3, 4, 6, and 7 in the Petition, as ordered by this court. Likewise, the petitioner has filed his reply to the State's response. Having reviewed the file, and the submissions of the parties, the court now rules as follows.

Argument #3

Petitioner asserts that his trial counsel, Floyd W. Holm, was ineffective because he

failed to call "Detective Orton" as a witness at the trial or to get in touch with him. The State properly points out that the petitioner did not include in his petition any reference to what Detective Orton might have said at trial to assist him in his defense.

In his reply, however, petitioner alleges that he was shown Detective Orton's police report and that it contained quotes from witnesses that would have buttressed petitioner's claim that the money bag in this case was taken from the counter in the main part of the store, and not from the manager's office. Petitioner points out that if Detective Orton was told by the witnesses that he took the money from the sales counter, rather than from the manager's office, the outcome on the burglary charge may have been different.

The court finds that an evidentiary hearing should be scheduled to allow the parties to question witnesses on this issue. The court would be aided by an opportunity to review Detective Orton's report, and to hear testimony from defense counsel about the decision not to call Detective Orton to impeach the prosecution's witnesses, assuming the statements made by the witnesses differ from their testimony at the trial.

Argument #4

Petitioner asserts that his trial counsel, Floyd W. Holm, was ineffective because he did not take reasonable steps to locate an unidentified couple who were briefly in the Deseret Industries store while the petitioner and his niece were there shortly before the theft of the money. Petitioner argues that Mr. Holm should have obtained investigation funds from the court to place an add in an attempt to identify these unnamed witnesses. In his reply the

petitioner admits that the attempt to locate these witnesses would have been a long shot and that he has no idea what they may have seen or what they might say at the trial.

The State response is that the petitioner has wholly failed to show that counsel's decision not to place an add was prejudicial him. The identity of the couple was never obtained. They left the scene while the police and the Deseret Industries employees were busy trying to apprehend the petitioner and his niece. There is no description of them or their vehicle. No one connected with this case has any information about where they might live. No one knows if their testimony would have hurt or helped the petitioner.

The court agrees with the State. To prevail on these claims, the petitioner must meet the burden of demonstrating that the conduct of counsel was ineffective under the two prong test articulated in the Strickland v. Washington case cited above. Certainly counsel was within his discretion to decline to pursue unknown and unidentified witnesses, especially when there was no way of knowing what they might say. Such an approach might well have developed damaging evidence which the prosecution and police had not unearthed.

Therefore, court now finds that even if the facts are as represented by the petitioner, he has failed to show any basis upon which the court could find his counsel ineffective for failing to pursue the unidentified couple. That claim is hereby dismissed summarily.

In this portion of his amended petition, petitioner also makes reference to certain photographs which he claims were taken at the store by Mr. Holm. Petitioner asserts that Mr. Holm told him that the photographs had evidentiary value, but never introduced the photos as evidence at the trial.

The court is of the opinion, and now rules, that the petitioner is entitled to an evidentiary hearing on the issue of the photographs so that the photographs may be presented to the court and Mr. Holm questioned about his decision not to introduce them at the trial.

Argument #6

Petitioner asserts that his appellate counsel, Mr. Floyd Holm, gave him ineffective assistance when he told the Court of Appeals that there was no dispute that the petitioner intended to commit a theft when he picked up the money bag, secreted it in his clothing and left the store.

The State responds that the position taken before the Court of Appeals was the same position taken at the trial, and was consistent with the petitioner's own testimony at the time of the trial.

The Court now rules, summarily, that the petitioner has failed to raise any justiciable issue in this argument and that he has failed to demonstrate ineffective assistance of counsel as a matter of law. His claims under this portion of his Petition are hereby dismissed.

Argument #7

Petitioner again asserts that his appellate counsel was ineffective by admitted to the Court of Appeals that the petitioner entered the store to commit a theft and by not filing a reply brief before that court.

In its response, the State quotes the portion of Mr. Holm's brief which gave rise to petitioner's complaint. Mr. Holm actually told the Court of Appeals "Although Defendant does not dispute the theft of the cash and checks, there was a dispute as to whether he

committed a burglary." (Quoting Appellants Brief, p. 4.) The State points out that Mr. Holm's statement is entirely consistent with the position of the petitioner before the trial court and the petitioner's own testimony there.

The court finds that the claim of the petitioner regarding the above quoted statement in the brief filed with the Court of Appeals does not, as a matter of law, demonstrate ineffective assistance of counsel. That argument of the petitioner is summarily dismissed.

The issue raise on appeal was not whether the petitioner committed a theft. The evidence before the trial court on that point was overwhelming. The appeal was filed to see if the evidence was sufficient to support the burglary conviction and the resulting consecutive sentences. Mr. Holm did not concede that issue before the Court of Appeals. Indeed, his statement was an attempt to frame the issue being raised on appeal. It would have been folly for Mr. Holm to attempt to argue that the evidence before the trial court did not support the conviction for theft, especially since his own client had admitted the theft at the trial.

ORDER FOR EVIDENTIARY HEARING

The case is ordered set for an evidentiary hearing on the remaining issues. The hearing shall be limited to evidence on:

1. Mr. Holm's decision not to interview Detective Orton or call him as a witness at the trial; and

2. Mr. Holm's decision not to introduce photographs of the Deseret Industries store at trial.

The matter is set for a scheduling conference in which both the petitioner and the attorney representing the State of Utah are to participate by telephone. The clerk will calendar the hearing and send notice to the parties of the time and date. During that conference the court will address the witnesses to be called, the exhibits to be introduced and the timing of the hearing. In addition, the court will discuss transportation concerns so that the petitioner can be present at the hearing.

Since the petitioner is incarcerated, the court hereby orders that the Office of the Utah Attorney General is to set up the telephonic scheduling conference and to arrange for Mr. Glasper's participation, and then connect the court at the appointed hour. Any arrangements concerning the scheduling conference can be coordinated with the court by calling Maxine at (435) 477-8695.

DATED this 20th day of January 2000.

J. PHILIP EVES, District Court Judge

Certificate of Mailing

I hereby certify that on this 21st day of January 2000, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

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Erin Riley, Esq.
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Salt Lake City, UT 84114-0854

Maxine Munson, Deputy Clerk

Addendum H

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND FOR IRON COUNTY, STATE OF UTAH

ROY LEE GLASPER, Petitioner, vs. STATE OF UTAH, Respondent.	MEMORANDUM OPINION CASE NO. 990500385 WR

This matter came before the court for an evidentiary hearing. Mr. Glasper was present representing himself. The State of Utah was represented by Erin Riley of the Utah Attorney General's Office. The court heard argument and evidence. The court now enters the following findings, conclusions and ruling.

PROCEDURAL HISTORY

In January, 1997, the petitioner and his cousin were arrested in Cedar City, Utah and charged with criminal acts. The petitioner was originally charged with burglary, theft and receiving stolen property. The case was investigated by the Cedar City Police Department and written statements were taken from the witnesses. The follow up investigation by the police department was under the direction of Detective Kelvin Orton.

The Iron County Attorney's Office was given the reports and information compiled by the police and filed formal charges against the petitioner. A preliminary hearing was held and the petitioner was bound over to the district court on all three charges pending against him. The petitioner entered a plea of not guilty and the matter was set for trial by a jury.

On the day of the jury trial, the petitioner elected to waive his right to a jury. The case was tried to the court after the State moved to dismiss the receiving stolen property charge. At the start of the trial, the petitioner admitted that he committed the crime of theft, as alleged in the Information, except that he reserved the issue of the amount of money taken.

At the conclusion of the evidence, the court found that the petitioner had committed theft by taking a money bag containing currency from the desk in the office at the rear of the Deseret Industries Store and fixed the amount of money taken in the Third Degree Felony range. The court also found that the petitioner had committed burglary by entering the enclosed office for the purpose of committing the theft. The petitioner was committed to the state prison.

Throughout the preliminary hearing and trial proceedings, the petitioner was represented by Mr. Floyd W. Holm as counsel for the indigent. Mr. Holm was, at the time, an experienced trial attorney, having tried about 20 jury trials and over a hundred day long court trials. Following the sentencing in this matter, the petitioner hired private counsel for a brief period and filed notice of appeal. He then requested appointed counsel and Mr. Holm was reappointed to represent him during the appeal, and did so.

On September 11, 1998, the Utah Court of Appeals issued a Memorandum Decision affirming the petitioner's conviction of both charges and upholding the sentence imposed.

On June 21, 1999, the petitioner filed in this court his Application For Writ Of Habeas Corpus. At the time he was housed in the California State Prison System having been transferred there by the Board of Pardons.

On June 30, 1999, this court issued a Memorandum Decision pursuant to Rule 65C, Utah Rules of Civil Procedure in which some of the issues raised by petitioner were summarily dismissed for the reasons stated in that Memorandum Decision. The remaining issue on the Application which survived summary dismissal was the claim of ineffective assistance of counsel which the petitioner raised for the first time since the trial, so far as the court was able to determine. Accordingly the Attorney General was served with the Application and responded with a Motion To Dismiss on the grounds that the respondent named in the Application was actually an official of the California Penal System and that the respondent should be the detaining authorities in the State of Utah.

In response, the petitioner filed an Amended Petition for Writ of Habeas Corpus naming the State of Utah as respondent. The Attorney General's Office then filed a Motion For Clarification.

On September 8, 1999, the court issued its Order ruling on the pending Motions. The matter was set for an evidentiary hearing on the petitioner's claims of ineffective assistance of trial and appellate counsel.

Thereafter, in response to motions from the petitioner, the court issued yet another Memorandum Opinion on January 21, 2000, in which the court delineated the two claims raised by the petitioner upon which the court would received evidence at the hearing:

1. Mr. Holm's decision not to interview Detective Orton or call him as a witness at the trial, and

2. Mr. Holm's decision not to introduce photographs of the Deseret Industries store at the trial.

It was that evidentiary hearing that occurred on May 9, 2000.

FINDINGS OF FACT

At the hearing the petitioner attempted to present testimony from witnesses about other alleged deficiencies in Mr. Holm's trial performance. However, since those deficiencies were not raised by the petitioner in his Amended Petition for Writ of Habeas Corpus, the court declined to hear that evidence.

The court finds that Mr. Holm did not interview Detective Orton in preparation for the trial, although he may have questioned him at the time of the preliminary hearing. The court finds further that Mr. Holm did not interview the witnesses from the crime scene, except to question them during their testimony at the preliminary hearing. The court finds further that Mr. Holm did not call Detective Orton as a witness for the defense at the trial.

Regarding the introduction of photographs at the trial, the court finds that no one on either side of the case took any photographs of the interior of the Deseret Industries Store to show the layout of the store for trial. The Deseret Industries Store is a commercial establishment open to the public and familiar to Mr. Holm. Mr. Holm determined that a diagram drawn by the store manager would suffice to illustrate to the court the issues presented in the case. Such a diagram was made during the trial at Mr. Holm's request, marked as an exhibit and introduced in evidence. The court had reference to the diagram at all times during the testimony of the employees from Deseret Industries and the petitioner.

INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

The petitioner has the burden of proving his claim of ineffective assistance of counsel

pursuant to the two prong test enunciated in the U.S. Supreme Court case entitled Strickland v. Washington, 466 U.S. 668 (1984).

> "{10} The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to defendants in all criminal prosecutions. This right has been interpreted as "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970). The test for determining when a defendant has been denied this right is set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Strickland establishes a two-part test: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. The petitioner must first show that the performance of his attorney was deficient when compared to the expected performance for trial counsel and that the deficiencies were prejudicial to the petitioner's case." [State v. Finlayson, 386 UAR 57 (Utah 2000)]

Detective Orton

The petitioner argues that his counsel should have called Detective Orton as a witness at the trial. Although it might have been more appropriate for Mr. Holm to have interviewed Detective Orton prior to the trial, it is clear from the testimony of Detective Orton which was received at the hearing on May 9, 2000, that Detective Orton's testimony would not have been helpful to the petitioner. Detective Orton's testimony demonstrates that he does not possess any evidence contrary to the statements of the witnesses about the location of the money bag before the petitioner admittedly took it. The detective does not have useful impeachment information to attack the credibility of the Deseret Industries employees.

Petitioner has failed to demonstrate how his defense counsel erred by failing to call Detective Orton. Rather, the defense attorney, Mr. Holm, testified that he expected that Detective Orton's testimony, if presented at trial, would actually have the effect of buttressing the statements of the State's witnesses to the detriment of the petitioner, as it would have shown that they were consistent in their statements about the location of the money bag.

Mr. Holm also testified that he could not have called Detective Orton to testify as to hearsay statements of the witnesses, because the statements given to him were consistent with the statements the witnesses gave at the trial.

Additionally, even if Mr. Holm erred in not calling Detective Orton as a witness, the petitioner has failed to demonstrate that his defense was prejudiced by that error. The trial in this case came down to a simple question: Did Mr. Glasper take the money bag from the cash register counter in the public part of the store or did he take the money bag from the enclosed office in the back of the store where he had no right to go?

Mr. Goldsworthy's testimony was unequivocal that the money bag was left on the top of the desk in the back office of the store when he went out on the sales floor to tell Mr. Glasper's niece that the store was closed. That testimony was buttressed, at least in part, by the testimony of Ms. Stover, who testified that as she was coming up to the sales floor area from a downstairs portion of the store, she saw the petitioner moving stealthily through the clothes racks on the sales floor and coming from the direction of the office. She observed that he had the store's money bag in his hand and saw him conceal it in his pants. She went immediately to Mr. Goldsworthy, who was standing near the cash register counter, and reported her observations.

These statements were apparently consistent with the testimony and statements of these two witnesses from the very beginning of this case.

On the other hand, Mr. Glasper testified that he did not enter the office at the rear of the store, but that he found the money bag lying on the cash register counter, picked it up and left the store with it. His version of the theft was in clear contradiction to the version given by the Deseret Industries employees. The court considered the possible motives of the witnesses to fabricate their testimony and chose to believe the employees, rather that Mr. Glasper.

Petitioner has failed to show that Detective Orton had any helpful information to contribute at the trial which would have cast a different light on the assessment of the facts made by the court.

Photographs

Petitioner argues that his trial counsel should have taken pictures of the Deseret Industries Store and introduced them at trial, rather than to rely on a diagram of the store. The court finds that petitioner has failed to demonstrate that his counsel erred in not taking such photos or in relying on the diagram drawn by the witness.

Mr. Holm testified that he did not think that photographs were necessary In fact, during his testimony Mr. Holm opined that unless he could get a photograph that showed the Deseret Industries building from the air without its roof, the diagram was the only way to show the court the relative positions of the office, the cash register counter, the front door, the stair case from downstairs and the witnesses at any given time.

Even if there was some error attributable to Mr. Holm for failing to take and submit photos, the petitioner has failed to demonstrate any prejudice to his case from the lack of photographs. The issue at trial was whether the court would believe the statements of the Deseret Industries employees or the statements of Mr. Glasper, who had admitted being a thief. The court chose, in its discretion, to believe the employees. Photographs would not have helped to change that exercise of discretion by the court.

INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

The petitioner has presented no evidence supporting his claim that he was rendered ineffective assistance of counsel on appeal. He argues, without any evidentiary support, that at one time during his representation by Mr. Holm, he expressed dissatisfaction with the handling of the trial. However, Mr. Holm has no recollection of any such conversation. Since the petitioner did not testify at the May 9, 2000 hearing, there is no evidence supporting petitioner's assertions.

Mr. Holm testified that he was never told that the petitioner was unhappy with his work, and consequently never told the court that Mr. Glasper was unhappy with his work, because he was not aware that Mr. Glasper felt that way. He stated that if he had known that Mr. Glasper was not happy with his work, he would have immediately sought permission to withdraw from the case and to have another attorney appointed to represent Mr. Glasper.

The court finds that there is no evidence that the appeal in this matter was mishandled by Mr. Holm, or that his work on that appeal was prejudicial to petitioner.

Accordingly, the Petition of the petitioner is denied in its entirety, and this application is dismissed.

DATED this 11th day of May 2000.

J. PHILIP EVES, District Court Judge

Certificate of Mailing

I hereby certify that on this 11th day of May 2000, I mailed true and correct copies of the above and foregoing document, first-class postage prepaid, to the following:

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